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SUPREME COURT, U.S.

No. 1088

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IN THE

Supreme Court of the United States

ARTHUR C. HOLDING, d/b/a GRAND NEWS,

Plaintiff-Appellant,

vs.

CHARLES NESBITT, OLIVER HODGE and BUCK COOK, individually and as the Oklahoma Literature Commission, CHARLES NESBITT, as Attorney General of the State of Oklahoma, and CURTIS HARRIS, individually and as an officer of the State of Oklahoma, County Attorney of Oklahoma County,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Plaintiff-appellant, Arthur C. Holding, d/b/a Grand News, appeals from a judgment of the United States District Court for the Western District of Oklahoma entered on November 4, 1966.

Opinion Below

The opinion of the three-judge District Court for the Western District of Oklahoma, reported at 259 F. Supp. 694, is attached as Appendix 1, and a copy of the judgment entered by the District Court is attached as Appendix 2.

Jurisdiction

This case was instituted by plaintiff-appellant in the United States District Court for the Western District of Oklahoma under 28 U.S.C. §§ 1331, 1343, 2201, 2202, 2281 and 2284, and 42 U.S.C. §§ 1983 and 1988, and under the Constitution of the United States, for a judgment declaring that the statutes creating the Oklahoma Literature Commission (21 Okla Stats. §§ 1040.1 to 1040.7) are repugnant to the United States Constitution, and for an injunction prohibiting defendants from acting under or enforcing those statutes.

In accordance with the applicable statute (28 U.S.C. § 2281), a three-judge court was convened.

The opinion and judgment of the three-judge District Court were filed on September 26 and November 4, 1966, respectively. The court held that certain portions of the statutes in question were repugnant to the Constitution, but that the balance of the statutes were valid. A notice of appeal was filed by plaintiff-appellant in the District Court for the Western District of Oklahoma on December 29, 1966.*

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*On November 10, 1966, defendants-appellees filed a notice of appeal from the District Court's judgment, and that appeal is pending before this Court. A single record has been filed for both cases in this Court.

Jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. § 1253. The following cases sustain the jurisdiction of this Court: *United States* v. *Georgia Public Service Commission*, 371 U.S. 285, 287 (1963); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 85 (1960).

Constitutional Provisions and Statutes Involved

The following constitutional provisions, statutes and rules are involved in this case:

(1) The Oklahoma statutes creating and implementing the Oklahoma Literature Commission (21 Okla. Stats. §§ 1040.1 to 1040.10), which are set forth in full in the District Court's opinion, reproduced as Appendix 1.

(2) The First and Fourteenth Amendments to the United States Constitution, the pertinent portions of which are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . "
>
> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . "

(3) The Rules and Regulations of the Oklahoma Literature Commission, which are set forth in Appendix 3.

Questions Presented

I.

The Oklahoma statute involved here (21 O.S. §§ 1040.1 to 1040.10) establishes the Oklahoma Literature Commission, made up of three high-ranking State officials, including the Attorney General, who has the ultimate responsibility for the enforcement of the State's criminal laws

concerning sale and distribution of "obscene literature." The Commission's statutory function is to make investigations "into sales of literature which it has reason to suspect is detrimental to the morals of the citizens of" Oklahoma. (21 O.S. 1040.2.) In carrying out this mandate—consistent with the judgment of the District Court in the case at bar—the Commission may hold hearings, subpoena witnesses and make findings as to the literature it deems to be obscene. The Commission must give notice of its hearings to the persons "accused of selling, distributing or otherwise providing the citizens of this State with the alleged obscene literature." (Commission Rule II.) While the Commission may no longer issue *orders* prohibiting sale or distribution of literature found to be obscene, it *must* still give notice to "the offending party or parties" of its hearings (Rule II) and of its findings that certain literature is obscene (Rule III), and it *must* provide the local County Attorney with its findings and evidence, *together with a recommendation that the "offending parties" be prosecuted under State criminal law.*

These facts give rise to the first of the two questions presented here, namely: Even as modified by the judgment of the District Court, does the statutory administrative system adopted by Oklahoma for ferreting out and prosecuting sellers and distributors of alleged obscene literature, involving an administrative determination of obscenity followed by a threat that failure to remove the black-listed publications from sale will subject the bookseller to multiple criminal prosecutions, impose a deterrent to freedom of written expression in Oklahoma, in violation of the First and Fourteenth amendments to the United States Constitution, and of the holding of this Court in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963)? This question is particularly presented because, as the District

Court held, the Oklahoma statutory procedure for *review* of the Commission's findings do not afford the minimum procedural safeguards required when states impose restraints on expression (see *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1964)).

II.

A few days after appellant, the owner of a small bookstore in Oklahoma City, filed this action challenging the constitutionality of the Oklahoma Literature Commission, the local County Attorney instituted 14 criminal prosecutions against appellant for selling the very same books which the Commission, eight days before, had found to be obscene literature. Only appellant was prosecuted; the other booksellers in Oklahoma City, who had bowed to the threats of prosecution contained in the Commission's order, were not (and have not been) prosecuted, although the evidence before the Commission was that 13 of the 14 books involved were purchased at the stores of the other booksellers.

These facts give rise to the second question presented by this appeal: Should the District Court have granted appellant's motion to enjoin the state court prosecutions under the principle of the "fruit of the poisoned tree" (see *Nardone* v. *United States*, 308 U.S. 338, 340 (1939)), pursuant to its power and duty to prevent the use of state criminal laws to stifle constitutionally protected freedom of expression (see *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965))?

STATEMENT

Appellant operates a newsstand in Oklahoma City, Oklahoma under the name "Grand News."

Appellees Nesbitt, Hodge and Cook are the three members of the Oklahoma Literature Commission ("the Commission"), created under the Oklahoma statute here in question, 21 O.S. §§ 1040.1-1040.10. Mr. Nesbitt is also the Attorney General of Oklahoma, the chief legal officer of the State, who has final responsibility for the enforcement, by County Attorneys, of Oklahoma statutes, including the one here involved. Mr. Hodge is the state Superintendent of Public Instruction, and Mr. Cook is the state Commissioner of Charities and Corrections. Appellee Harris is the County Attorney of Oklahoma County, Oklahoma.

The Commission's Powers

The statute provides that the Commission shall " . . . make such investigations as may be necessary into sales of literature which it has reason to suspect is detrimental to the morals of the citizens of this state." The Commission is empowered to "hold hearings and make findings on literature it finds to be obscene." (21 O.S. § 1040.2.) "Obscene literature" is defined in 21 O.S. §§ 1040.1(b) and 1040.9.

The Commission acts upon its own information and upon evidence furnished to it by interested citizens. (21 O.S. § 1040.3.) The Commission has power to issue subpoenas to require the appearance of witnesses and the production of documents. (75 O.S. § 315; Rule II, App. 19.)

The Rules adopted by the Commission (Appendix 3) provide that "No formal hearing shall be held except upon 15 days notice to the offending party or parties accused of providing the citizens of this State with the alleged obscene literature." (Rule II, App. 19.) The notice must include "a short and plain statement of the matters asserted" against the "offending party." (75 O.S. § 309 (a) (4).) The person "accused of selling, distributing or otherwise providing the citizens of this state with the alleged obscene literature, or any other interested person, may appear at such hearing and give evidence upon the matters under consideration." (Rule II, App. 19; see also 21 O.S. § 1040.3.)

The statute and the Commission's Rules provide that at the conclusion of all formal hearings, the Commission shall "make findings on literature it finds to be obscene," and that the Commission "shall have the power to make an order prohibiting the sale or distribution of any literature it finds to be obscene by first informing the offending party or parties prior to prohibiting such distribution or recommending prosecution . . . " (21 O.S. § 1040.3; Rules I and III, App. 18-19.) "The order of the Commission shall be either a recommendation for prosecution under the criminal laws of the State or prohibition against the sale or distribution of any literature it finds to be obscene, or both." (Rule III, App. 19.) The "offending party" must be notified of the proposed order at least 10 days before the order is entered. (Rule III, App. 19; 75 O.S. § 311.) The Rule also provides (App. 19-20):

> "If the offending party or parties shall cease the sale and distribution of such obscene literature and notify the Commission, then, the Commission shall make a minute of such fact and take no further action. If, however, the offending party or parties do not cease the sale and distribution of such obscene litera-

ture, after notice, the Commission shall either prohibit, by written order, the further sale or distribution of such obscene literature, or shall by written order, recommend the prosecution of such party or parties to the County Attorney of the County where such distribution is taking place, and the Commission shall furnish the County Attorney any evidence it might have obtained during its hearings and proceedings in relation thereto."

Violation of an order of the Commission is a misdemeanor. (21 O. S. §1040.6.)

The statute directs the Commission to notify the local County Attorney of its findings and recommendations, and to provide the County Attorney with evidence obtained by the Commission during its hearings. The Attorney General (who is a member of the Commission) has "the ultimate responsibility" for the prosecution of such cases. (21 O.S. § 1040.4.)

Persons affected by the Commission's orders have a right to seek judicial review under the Oklahoma Administrative Procedures Act. (75 O.S. §§ 301-325; Rule IV, App. 20.)

The Hearings Before the Commission In March, 1966, and the Commission's Order

In February, 1966, the Commission received complaints from several Oklahoma citizens (including groups known as the "Oklahoma Literary Review Board" and the "Citizens for Decent Literature") who had purchased pocket books from various stores and newsstands in Oklahoma City. (Def. Ex. 1.) In all, over 200 books were submitted to the Commission. The Commission selected 14 of these books at random as the subject of a hearing to be held on March 28, 1966. (Def. Ex. 5, p. 3.) Notices of the hearing were sent to the sellers and the local distributor of the

14 books (Def. Ex. 2), including appellant, at whose newsstand two of the books were allegedly purchased. (Def. Ex. 1, pp. 6 and 11). The notices stated that the Commission had received complaints that the persons notified had sold or distributed allegedly obscene literature, and that the Commission would hold a hearing on the complaints on March 28, 1966 at the State Capitol Building.

Appellant's counsel appeared at the hearing and challenged the Commission's jurisdiction and the validity of the statute creating the Commission, on multiple constitutional grounds. The Commission proceeded with the hearing, however, and received testimony regarding purchases of the 14 books in question. The evidence established that only one of the 14 books was purchased at appellant's book store, and that the other 13 books were bought at the stores of four other Oklahoma City booksellers. (Def. Ex. 5, pp. 5 to 7, and 11-28.)

On March 30, 1966, the Commission announced that it found the 14 books in question to be obscene literature. The Commission mailed a copy of its Findings and Notice of Proposed Order (Ex. 2 to Complaint) to appellant; this document states in part:

> "It is therefore ordered by the Oklahoma Literature Commission that each of the above-listed books and literature be and the same are hereby declared to be obscene; that the sale or distribution thereof is prohibited, effective upon entry of a final order thereon; that in the event any person having due notice of the order of this Commission prohibiting such sale shall thereafter sell or distribute the same, this Commission will recommend prosecution of the offending parties; that notice by certified mail be given the above-named persons, firms and corporations by mailing copies of this Order; that the Commission will enter a final Order herein ten (10) days from the date of

entry of these findings, which final order will prohibit the further sale of such literature, and thereafter the Commission will recommend prosecution for any continued sale or distribution of this literature subsequently occurring by any party having notice thereof."

This Action and the 14 State Criminal Prosecutions Against Appellant

On *April 5,* 1966, appellant filed this action in the District Court for (i) a declaratory judgment that the Oklahoma statute relating to the Commission is repugnant to the United States Constitution, (ii) an injunction restraining the members of the Commission from issuing orders prohibiting the sale or distribution of literature by appellant and from recommending prosecution of appellant, and (iii) an injunction restraining state-court prosecution of appellant on the recommendation of the Commission.

On *April 6,* 1966, on appellant's motion, a temporary restraining order was issued which provided *(inter alia)* that defendant Harris, the County Attorney, was enjoined from prosecuting plaintiff "on the recommendation of the Commission." Thereafter, a three-judge court was duly convened.

On *April 7,* 1966, County Attorney Harris filed 14 criminal informations against appellant in the local state court, charging appellant with having unlawfully sold *the same 14 books which the Commission had found to be obscene.* (Pl. Ex. 3-16.) (None of the other booksellers involved has been prosecuted with respect to these books.)

Appellant thereafter filed a motion requesting that the temporary restraining order should be extended to enjoin the 14 state criminal prosecutions. County Attorney Harris filed a verified response in which he stated that the criminal proceedings were "not in any respect taken by [him] by

reason of, or as the result of any action, direction or decision of the Oklahoma Literature Commission." He did not deny knowledge of the recommendation or order of the Commission, nor that such knowledge affected his judgment in determining to proceed on these particular books, and against appellant alone out of all the booksellers in Oklahoma. On August 2, 1966, the three-judge court denied appellant's motion. (Record 141.)

The Ruling of the Three-Judge District Court

The case was submitted to the three-judge District Court on the pleadings and exhibits. By its opinion (Appendix 1) and judgment (Appendix 2) the District Court:

(1) Refused to enjoin the 14 state criminal prosecutions (App. 2-3, 6-9, 15);

(2) Held that the definition of "obscene literature" contained in 21 O.S. § 1040.1 (b) is unconstitutional "for lack of preciseness. (App. 14, 15.) (See *Butler* v. *Michigan*, 352 U.S. 380." (The Court held, however, that the definition of "obscene literature" in 21 O.S. § 1040.9 is valid. App. 14, 15.)

(3) Held that the last sentence of 21 O.S. § 1040.3—which authorizes the Commission to enter orders prohibiting the sale of literature it finds to be obscene—is unconstitutional (App. 9, 16);

(4) Held unconstitutional 21 O.S. § 1040.6, which provides that a person who violates an order of the Commission is guilty of a misdemeanor (App. 9, 16); and

(5) Held the balance of the statute creating the Commission to be valid. (App. 9, 16.)

The Court said (App. 13-14):

> " . . . in leaving in force those portions of the Oklahoma Literature Commission Act which are not herein declared unconstitutional, we must issue a *word of warning*. 'Bantam Books' clearly condemns notices or orders issued to claimed offenders by a state agency such as the Oklahoma Literature Commission, and also condemns censorship effectuated by extra legal sanctions. The Commission is free to investigate and recommend prosecution to the appropriate law enforcement agency, but it may not in its activities indulge in threats of prosecution against claimed offenders or employ other means of coercion, persuasion and intimidation. Their activities cannot, in effect, be a substitution for the State's criminal regulation of obscenity. This is the office and responsibility of the prosecutors." (Emphasis the Court's.)

Despite this language in the Court's opinion, however, the only restraint on the Commission's conduct provided in the Court's judgment is (App. 16):

> "The defendants shall be restrained and enjoined from making any order prohibiting the sale or distribution of any literature and from instituting any criminal proceedings under Section 1040.6 for violation of any Commission order."

Appellant has perfected a direct appeal to this Court pursuant to 28 U.S.C. § 1253.

I.

Informal Censorship, Carried On By the Highest Legal Officer of Oklahoma Without Satisfying the Judicial Requirements Set Forth By This Court, Presents A Serious Threat To Constitutionally Guaranteed Freedom of Speech.

A Substantial Question Exists Whether the Oklahoma Literature Commission Statute, As Altered By the District Court, Conforms To the Requirements of the United States Constitution.

A threshold question is presented whether the Oklahoma Literature Commission statute, as altered by the decision of the District Court, is consistent with the principles enunciated by this Court, or whether it is in reality "a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 69 (1963). For, as this Court said in *Bantam Books* (372 U.S. at 67-68):

> "... We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.
>
> "... People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, ..."

This is exactly what the Oklahoma Literature Commission statute, as modified and approved by the District Court, will sustain, indeed encourage: "public officers' thinly veiled threats to institute criminal proceedings against [booksellers] if they do not come around." Even with its powers restricted by the judgment of the District Court, the simple truth is that the Oklahoma Literature Commission will continue effectively to control, with-

out judicial review, what the citizens of Oklahoma may read. There is no real distinction between "threats of prosecution" uttered in the form of "proposed" orders *recommending* prosecution from a Commission on which sits the Attorney General of the State, and the "threats of prosecution" which the District Court held must be interdicted.

The only power denied to the Commission is the *actual entry* of orders prohibiting sales and threatening prosecution for failure to obey such orders. The Commission is still free to follow the procedure established by the governing statute, including serving on "the offending party" a "notice of the matters asserted" (75 O.S. §309(a) (4); Rule II), and notice of its intended findings (75 O.S. §311; Rule III). It would be naive to believe that these notices will not have the same repressive effect as the system had prior to the decision of the District Court, or that they will result in no more chilling of expression than would the complaint of a private citizen. The precatory "word of warning" contained in the Court's opinion—but *not* in its judgment—will not prevent Oklahoma's peculiar brand of extra-judicial intimidation of freedom of expression, condemned by this Court in *Near* v. *Minnesota*, 283 U.S. 697 (1931) and subsequent cases.

The notices emanate from a Commission made up of three high ranking State officials, including the State's chief legal officer. They are followed by public hearings at which the "offending party" and his books may be subpoenaed. The Commission is encouraged by the District Court to "recommend" that criminal actions be instituted against those booksellers who do not come around. As in the case at bar, those who do not acquiesce in the Commis-

sion's judgments may expect to be prosecuted criminally—especially since the Attorney General of Oklahoma, a member of the Commission, bears "the ultimate responsibility" for such prosecutions. (21 O.S. §1040.4.)

The order of the Commission, issued in a "proposed" form finding certain named books to be "obscene literature" and recommending criminal prosecution by a lesser officer of the legal heirarchy headed by the Attorney General, will inevitably be followed by (1) issuance of the recommendation and (2) the criminal prosecutions proposed, should the respondent fail to bow to the threat. This is a sure way to force compliance with administrative determinations of obscenity, and to wield a bludgeon to force suppression of any expression which the Commission determines "obscene."

This Court has said that "The separation of legitimate from illegitimate speech calls for more sensitive tools. . . ." *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958). Despite the ruling of the District Court, the Oklahoma procedure for dealing with obscene literature remains more heavy-handed than that condemned in *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1962). Here, as in *Bantam Books,* the Commission's mandate means whatever the members choose; the Commission is commanded to ferret out all literature "which it has reason to suspect is detrimental to the morals of the citizens of this State." (21 O.S. § 1040.2; *cf. Sweezy* v. *New Hampshire,* 354 U.S. 234, 253-255 (1957).) Here, as in *Bantam Books,* the Commission's findings merely determine that the literature is "obscene" without further elucidation (*cf. S.E.C.* v. *Chenery Corp.,* 318 U.S. 80, 94-95 (1943). Here, even more clearly than in *Bantam Books,* the bookseller knows that recalcitrance will lead to criminal prosecution, as it did in appellant's case.

In short, the Commission's much-heralded inquiries and the notices of its proposed findings are tantamount to authoritative pronouncements that the "offending parties" must either cease handling the material involved, or else face trial in the State criminal court.

Thus, the statute still embodies "a highly efficient *in terrorem* mechanism." *Keyishian* v. *Board of Regents*, 87 S.Ct. 675, 683 (1967). Whereas "First Amendment freedoms need breathing space to survive" (*N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963)), in Oklahoma the Literature Commission can, has and will choke off whatever literature it chooses. Those, such as appellant, who oppose the judgments of the Commission, will suffer the penalty of multiple, expensive* criminal prosecutions.

The District Court analogizes the Commission's actions to those of a private citizen who makes a complaint to his local prosecutor. But this statutory body, composed of high ranking State officials, is far from being the equivalent of a private citizen. *It is an arm of the State.* In discussing the duty of citizens to call violations of the law to the attention of the prosecutor (App. 8-9), the District Court shut its eyes to the deterrent and chilling effect which the activities of this Commission will continue to have on First Amendment rights in Oklahoma. It would demand a hardy bookseller to offer resistance to the Commission, knowing full well that a recommendation of criminal prosecution will follow if he does so—just as in the case at bar, in which appellant's legal challenge to the Commission was promptly met with multiple criminal prosecutions. As this Court observed in *Bantam Books*, "the distributor who is prevented from selling a

*Appellant was required to post bonds totalling $7,000 in the state criminal prosecutions. He faces 14 separate trials.

few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights." (372 U.S. at 65, fn. 6.)* The result is that the Commission's findings will be promptly adhered to by booksellers throughout the State. The inevitable effect of these extra-judicial investigations, hearings and findings is an interference with First Amendment rights far more serious than that which this Court struck down in *Bantam Books*.

It is no answer to say that compliance is "voluntary" when, as here, harsh economic coercion is involved. ". . . inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J. concurring).

It is entirely within the realm of reasonable foreseeability that booksellers in Oklahoma, like Winston Smith of NINETEEN EIGHTY-FOUR, will covet and press to their bosoms the sweet judgments of Big Brother—the Oklahoma Literature Commission.** And all of this will be accomplished *without*

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* ". . . the distributor or dealer normally complies without protest to the informal pressure of an official index, for his stake in the community is large and his investment in particular books and magazines is inconsiderable." *The Supreme Court, 1962 Term*, 77 Harv. L. Rev. 62, 126 (1963); " . . . Although eventual vindication may be assured, it may come only after a series of costly appeals and much damaging publicity." *Entertainment: Public Pressures and the Law*, 71 Harv. L. Rev. 326, 346 (1957); cf. *HMH Publishing Co.* v. *Garrett*, 151 F. Supp. 903, 904-905 (N.D. Ind. 1957).

**This process has already begun. *Before* the hearings of the Commission on March 28, 1966, one of the booksellers involved in the case at bar wrote the Commission that he "would remove voluntarily, anything from sale that this or any formal body in the State ruled as pornographic." (Def. Ex. 5, p. 22.) *After* the hearings *all* booksellers in Oklahoma City except appellant agreed not to sell the books condemned by the Commission. (Page 31 of Transcript of August 18, 1966, Record p. 301.)

(in the words of the District Court, App. 13-14) "threats of prosecution against claimed offenders or . . . other means of coercion, persuasion and intimidation"! The District Court failed to "look through forms to the substance" (372 U.S. at 67) and recognize the powerful regime of extra-judicial censorship which remains inherent in the Commission's activities.

To make matters worse, as the District Court correctly held (App. 12-13), the Oklahoma statutes relating to review of the Commission's findings do not comport with *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1964), which establish minimum procedural requirements when states seek to impose restraints on expression.

We earnestly submit that this question is substantial and should be resolved after full hearing by this Court.

II.

It Is Clear On This Record That the 14 State Criminal Prosecutions Were Instituted As a Reprisal Against Appellant.

A Substantial Question Is Presented As To Whether the State Criminal Prosecutions Should Be Enjoined.

A second substantial question is presented by this appeal: Whether the District Court erred in refusing to enjoin the 14 State court criminal prosecutions instituted against appellant immediately after he had the temerity to bring suit against the Commission in the Federal Court.

The County Attorney stated, in his carefully worded pleading, that he did not institute the prosecutions upon "any action, direction or decision of the Oklahoma Literature Commission." But the County Attorney did *not* deny that he knew of the action, order and decision of the Okla-

homa Literature Commission, nor of the recommendation which was implicit within it. He did *not* deny that such knowledge affected his decision to move against appellant with the 14 criminal prosecutions. Indeed, no rational being would believe any such denial.

It is obvious that the laws of chance were not involved in the prosecutor's selection of these very books and his choice of appellant as the only bookseller against whom to proceed, despite the fact that at least four others sold some or all of the same books. It would be ridiculous to suppose that the prosecutor, at random, fortuitously chose the same 14 books that the Commission had condemned a few days earlier. When one considers the many thousands of books then on sale in Oklahoma (or even Oklahoma City), the odds against identical selection by chance are astronomical. If more than mathematical odds were required to establish a causal connection between the Commission's findings and institution of the criminal cases, it must be remembered that the testimony before the Commission established that 13 of the 14 books were sold by other bookstores; yet only appellant, who alone brought this suit, was the target of the criminal actions.

The simple and obvious truth is that the state-court prosecutions are a reprisal against appellant.

It would unleash a dangerous doctrine if this system for repressing freedom of expression were approved. The facts are:

(1) The Oklahoma Literature Commission (including its "law member," the Attorney General of the State) decrees by extra-judicial action that 14 books are obscene, and that appellant and all other booksellers in Oklahoma must cease to sell them or be prosecuted;

(2) Appellant alone challenges the constitutionality of that action; all other booksellers capitulate;

(3) The County Attorney of Oklahoma County, a legal officer standing in the hierarchy of officialdom a rung below the Attorney General, institutes 14 criminal prosecutions naming *the same 14 books,* but brings them *only against appellant;* and

(4) *The time span from (1) to (3) is only 8 days!*

The District Court found that the procedure by which these books were condemned did not comport with constitutional requirements. The Court nevertheless rejected appellant's contention that the illegality of those procedures tainted the resultant state prosecutions, wherefore the prosecutions should be enjoined under the "fruit of the poisoned tree" doctrine of *Nardone* v. *United States,* 308 U.S. 338, 340 (1939).

The District Court was, we submit, clearly wrong. The law should not permit an individual bookseller to be punished with multiple criminal prosecutions because he seeks judicial protection against unlawful abridgment of his First Amendment rights. The District Court found unconstitutional certain actions of the Oklahoma Literature Commission, but ignored the relation of those actions to the criminal prosecutions. Thus the full weight of the pressure of the unconstitutional action has fallen upon the appellant, who is provided no relief from that pressure. It is the classic example of a "little man" punished because he fights against the illegal exercise of power by a state administrative agency.

The power of the federal courts to enjoin state criminal prosecutions has been clear since this Court decided *Dom-*

browski v. *Pfister*, 380 U.S. 479 (1965). In *Dombrowski* this Court stated (380 U.S. at 489-490):

> "We hold the abstention doctrine is inappropriate . . . where, unlike *Douglas* v. *City of Jeannette*, statutes are justifiably attacked [because] . . . applied for the purpose of discouraging protected activities."

See also *Cameron* v. *Johnson*, 381 U.S. 741 (1965); *Ex Parte Young*, 209 U.S. 123, 161-162 (1908); *Reed Enterprises, Inc.* v. *Corcoran*, 354 F. 2d 519, 523 (D.C. Cir. 1965).

If not interdicted, these prosecutions will effectively discourage free expression of the precious freedom of written expression throughout Oklahoma.

This issue, we suggest, calls for plenary consideration by this Court. Unless it is made clear that states may not, either directly or indirectly, exert pressures to stifle freedom of expression, the teaching of *Bantam Books* will be lost.

Conclusion

We earnestly submit that substantial constitutional issues are involved in this appeal, and that probable jurisdiction should be noted and the case set for plenary consideration on the merits.

Respectfully submitted,

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February, 1967

APPENDIX

APPENDIX 1

Opinion of the United States District Court for the Western District of Oklahoma, filed September 26, 1966 (259 F. Supp. 694).

Eubanks, District Judge:

MEMORANDUM OPINION

Plaintiff, a resident and citizen of Oklahoma City and operator of a news stand therein, brought this action for a judgment declaring the Oklahoma Statutes creating the Oklahoma Literature Commission (21 O.S. 1040.1 to 1040.7) to be violative of the Constitution of the United States and for an injunction prohibiting defendants from acting under or enforcing those statutes. Principal defendants are Charles Nesbitt, Attorney General of the State of Oklahoma, Dr. Oliver Hodge, State Superintendent of Public Instruction, and Buck Cook, Commissioner of Charities and Corrections, who are ex officio members of the Oklahoma Literature Commission under the terms of the Act. The remaining defendant, Curtis Harris, is the County Attorney of Oklahoma County, Oklahoma.

A Three Judge Court was convened to hear said case pursuant to the provisions of Sections 2281 and 2284, Title 28, U.S.C.

It is alleged in the complaint and established by stipulations and documentary evidence that earlier this year commissioner defendants sent plaintiff a notice telling him that a hearing of the Oklahoma Literature Commission was to be held at the State Capitol Building, Oklahoma City, Oklahoma, on March 28, 1966, for the purpose of determining whether or not fifteen named books are deemed by the Commission to be obscene literature. Plaintiff had

been selling or had sold fourteen of the fifteen books named in the notice. On the appointed date plaintiff appeared with counsel before the Commission and challenged the validity of the aforesaid statutes creating the Commission, but the Commission proceeded with its hearing and announced that fourteen of the fifteen books had been found to be obscene literature by the Commission and announced that it would issue an order prohibiting the sale or distribution of said fourteen books and that the Commission would recommend to Curtis Harris, County Attorney of Oklahoma County, that plaintiff and others be prosecuted for distribution and sale of obscene literature. Plaintiff also alleges that he is threatened with prosecution for a violation of the Commission's proposed order prohibiting the sale of the aforementioned books. Plaintiff further alleged, and defendants concede that it was contemplated that the formal order of the Commission banning the sale of the fourteen books would be entered on the seventh day of April, 1966, however, this Court entered its temporary restraining order on the sixth day of April, 1966, enjoining the Commission from entering such order. After the temporary restraining order was issued the County Attorney, Curtis Harris, instituted fourteen separate criminal prosecutions against the plaintiff herein wherein it is alleged that Arthur C. Holding did wrongfully and knowingly commit the crime of selling, offering for sale, and exhibiting an obscene book, and each separate information mentions one of the fourteen books found to be obscene by the Commission. When these fourteen criminal prosecutions were instituted the plaintiff herein requested of this Court that the temporary restraining order be enlarged to enjoin the defendant, Curtis Harris, from continuing the prosecution in those cases. In said application for an order enlarging the temporary restrain-

ing order the plaintiff contended that we have here what is analogous to "The Fruit of the Poisoned Tree" situation where the very same books found to be offensive by the Commission are made the basis of the criminal charges and that it is circumstantially obvious that the filing of same was directly connected with the illegal Commission action, but the defendant, Curtis Harris, and other defendants herein allege that the fourteen criminal prosecutions were instituted by the County Attorney on his own initiative and that he acted independently of and in the absence of any recommendations made to him by the Oklahoma Literature Commission, and further, that the fourteen criminal cases were instituted under Sections 1040.8, 1040.9, and 1040.10, Title 21 of the Oklahoma Statutes and not under the Literature Commission procedures. In this connection it should be mentioned that the last three mentioned sections of the Oklahoma Statutes were enacted in 1961 whereas Sections 1040.1 through 1040.7 were enacted in 1957. This Court, after having thoroughly examined the pleadings and briefs of all parties bearing on the question, entered its order on August 2, 1966, denying plaintiff's application for enlargement of said order for the reasons stated therein and for additional reasons as will be shown herein.

For a full understanding of the issues in this case the 1957 Act of the Oklahoma Legislature creating the Oklahoma Literature Commission is set forth in full, to-wit:

§ 1040.1 DEFINITIONS

For the purposes of this Act:

(a) "Literature" shall mean any book, pamphlet, paper, drawing, lithograph, engraving, photograph, or picture.

(b) "Obscene literature" shall mean any literature offensive to the chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed, or so-called comic books which, in the opinion of the Commission, are not uplifting and beneficial to the education, welfare, and character building of the children of Oklahoma.

§ 1040.2 OKLAHOMA LITERATURE COMMISSION — MEMBERSHIP — INVESTIGATIONS—REPORTS

There is hereby created the Oklahoma Literature Commission, which shall consist of the Commissioner of Charities and Corrections, the Attorney General or a member of his staff designated by the Attorney General, and the State Superintendent of Public Instruction or a member of the State Department of Education designated by the State Superintendent of Public Instruction. The Commissioner of Charities and Corrections shall serve as Secretary of the Commission and shall keep all of the records and files thereof. The Commission shall make such investigations as may be necessary into sales of literature which it has reason to suspect is detrimental to the morals of the citizens of this State. The Commission shall submit an annual report of its activities to the Governor and to the State Legislative Council.

§ 1040.3 HEARINGS AND FINDINGS—ORDERS

The Commission shall hold hearings and make findings on literature it finds to be obscene through its investigations or from evidence furnished to it by any citizen of the State. The person, partnership, company, corporation, or other agency selling, distributing, or otherwise providing the citizens of this State with the alleged obscene literature may appear and give evidence at such hearing. The Commission shall make its findings upon all hearings and shall have the power to make an order prohibiting the sale or

distribution of any literature it finds to be obscene by first informing the offending party or parties prior to prohibiting such distribution or recommending prosecution as hereinafter provided.

§ 1040.4 PROSECUTIONS

The Commission shall recommend prosecution under the criminal laws of the State of any person, partnership, company, corporation, or other agency that it finds to be selling or otherwise distributing obscene literature. The Commission shall notify the County Attorney of the county in which such literature has been sold, or otherwise distributed, of its findings and recommendations, and shall provide the County Attorney with any evidence it might have obtained during its hearings and the proceedings in relation thereto. The County Attorney shall have the primary responsibility, and the Attorney General shall have the ultimate responsibility, for such prosecutions.

§ 1040.5 LITERATURE EXEMPT

The provisions of this Act shall not apply to, and there is hereby exempted therefrom, all weekly and daily newspapers, all Federal and State matters, and all reading matter used in recognized religious, scientific, or educational institutions.

§ 1040.6 PENALTY

Any person, partnership, company, corporation, or other agency violating any order made by the Commission under the provisions of this Act shall be guilty of a misdemeanor.

§ 1040.7 PAYMENT OF EXPENSES

All expenses necessary to be incurred by the Commission in carrying out the provisions of this Act shall be paid from appropriations made for the operation of the office of the Commissioner of Charities and Corrections.

The 1961 Act of the Oklahoma Legislature provides as follows:

> § 1040.8 PUBLICATION, DISTRIBUTION OR PARTICIPATION IN PREPARATION OF ANY OBSCENE MATERIAL OR PRESENTATION—PENALTY
>
> It shall be unlawful for any person to knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, publish, offer to publish, or otherwise distribute, make display, or exhibit, any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, presentation, or other article which is obscene, and any person who shall violate any provision of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period of not more than one (1) year or by a fine of not more than One Thousand Dollars ($1,000.00) or by both such fine and imprisonment.
>
> §1040.9 OBSCENE LITERATURE DEFINED
>
> "Obscene literature" shall mean any literature which, considered as a whole in the light of contemporary community standards, has as its predominant theme an appeal to prurient interest.
>
> § 1040.10 PROVISIONS CUMULATIVE
>
> The provisions of this act shall be cumulative to existing laws.

Addressing ourselves further to the proposition advanced and urged by plaintiff that the fourteen criminal prosecutions pending in the Common Pleas Court of Oklahoma County should be stopped, and partially reiterating our earlier order, we are of the opinion that the 1957 legis-

lation and the 1961 legislation detailed above allow two separate and independent proceedings with only one involving the Oklahoma Literature Commission. The United States Courts are most reluctant to enjoin the enforcement of the criminal laws of the state. See *Douglas* v. *Jeanette,* 319 U.S. 157. The only case called to our attention wherein the United States Courts have restrained pending or threatened state court criminal prosecution is *Dombrowski* v. *Pfister,* 380 U.S. 479, but the facts in the *Dombrowski* case are in no way analogous to those presented in this proceeding and we have concluded that it is not precedent for enjoining the fourteen criminal prosecutions. However, we do wish to quote from the *Dombrowski* case some general principles which we think to be applicable to the elected officials in the State of Oklahoma and specifically those defendants herein to-wit:

> "It is generally to be assumed that the state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."
>
> "And in a variety of other contexts the Court has found no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution. In such cases it does not appear that the plaintiffs 'have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued in this Court.' "

Further in connection with this matter, we have not seen the fourteen books involved in this case and are not called upon to determine the question of whether or not they are obscene. We find from the pleadings and admissions and stipulations that the defendant, Curtis Harris, instituted said fourteen criminal prosecutions independent of and in absence of any recommendation made to him by the Oklahoma Literature Commission but even if the Commission had recommended prosecutions in said cases the "Fruit of the Poisoned Tree" doctrine enunciated in *Nardone* v. *U.S.*, 308 U.S. 338, would not justify or allow us to enjoin said prosecutions. Here we have no indication that the books in question were obtained from plaintiff by the Commission through other than legal means. Plaintiff simply contends that Commission procedures are lacking in due process and contravene the First and Fourteenth Amendments. Since the findings of the Commission would not be binding upon the court or jury trying the fourteen criminal cases nor even admissible in evidence and since the criminal trials will be conducted with due regard to all of plaintiff's constitutional rights with the burden upon the State to prove beyond a reasonable doubt all essential allegations, including, among others, scienter and that the book(s) are indeed obscene, we again decline to halt the orderly determination of those charges. We believe and hold that any citizen of the United States may freely recommend to the proper official a prosecution of what the citizen believes to be an unlawful act. It then rests with the prosecutor to determine if charges should be filed. We believe and further hold that the Oklahoma Literature Commission would be well within its right to recommend a prosecution to the proper county attorney of offenders of the obscenity laws of the State of Oklahoma even if they obtain their evidence at hearings pre-

scribed by Section 1040.3 of the act. We go further and say that in our opinion the Commission would be derelict in its duty if it failed to report a violation of the obscenity statutes if it has knowledge of such violation. Any private citizen has the right to report the violation of the criminal laws to the appropriate prosecuting authority and may be morally obligated to do so although there is no legal requirement that such be done. (*Wilson* v. *State,* 306 P. 2d 717). Certainly then plaintiff has no legal standing to denounce the Commission for "turning him in" if in fact the Commission had done so. And when the duly authorized prosecuting attorney files a criminal charge whether his attention is directed thereto by a board, commission, or private citizen, no court, State or Federal, should place any impediment in the path of orderly determination of the charge except for extenuating and compelling reasons as in *Dombrowski.* If plaintiff is not selling or has not sold obscene books, he has nothing to fear from the pending prosecutions. If he has violated the criminal laws of the Sovereign State of Oklahoma in that regard, he ought to be punished therefor.

The plaintiff herein has requested that we declare the Oklahoma Literature Act invalid in toto which we decline to do. However, we find no difficulty in declaring invalid the last sentence of Section 1040.3 which provides:

> The Commission shall make its findings upon all hearings and shall have the power to make an order prohibiting the sale or distribution of any literature it finds to be obscene by first informing the offending party or parties prior to prohibiting such distribution or recommending prosecution as hereinafter provided.

And we further have no doubt whatever that Section 1040.6 is altogether invalid.

Accordingly, the defendants herein and those acting by, through, or under them are hereby restrained and enjoined from making any order prohibiting the sale or distribution of any literature and from instituting any criminal proceedings under Section 1040.6 for violation of any Commission orders. This ruling is no reflection on the integrity, good faith, or judgment of the individual commissioners, but is based squarely upon decisions of the United States Supreme Court in *Bantam Books* v. *Sullivan,* 372 U.S. 58, *Freedman* v. *Maryland,* 380 U.S. 51, *Marcus* v. *Search Warrant,* 367 U.S. 717, and *Reed Enterprises* v. *Corcoran,* 354 F. 2d 519. In the *Bantam Books* case cited above it was shown that the Rhode Island Legislature had created the Rhode Island Commission to encourage morality in youth whose duty it was to educate the public concerning obscene literature and to investigate and recommend the prosecution of all violations of the Rhode Island Obscenity Statutes. The Commission's practice was to notify distributors that certain named books and magazines had been declared objectionable by the Commission. No criminal prosecution was expressly threatened, but the Commission's notices stated that copies of the list of objectionable publications had been distributed to local police. The distributors usually removed the named books from circulation on receipt of the Commission's notice. Four publishers of paperback books filed suit for a judgment that the Commission's practices contravened the federal constitution. In the United States Supreme Court the Commission argued that it simply exhorts booksellers and advises them of their legal rights. In answer to this proposition the Court said:

> "... This contention, premised on the Commission's want of power to apply formal legal sanctions, is untenable. It is true that appellants' books have not

been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.

* * *

"... People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and Silverstein's [a distributor] reaction, according to uncontroverted testimony, was no exception to this general rule. The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications ex proprio vigore. It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity. . . ."

The Supreme Court held that the Rhode Island Commission's practices were unconstitutional and in doing so further said:

"Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a de-

> termination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

Therein, and quoting from *Marcus* v. *Search Warrant*, 367 U.S. 717, the Court further said:

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech."

And in "Bantam Books" the Court said further:

> "What Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned. Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."

It will be readily seen that the Oklahoma Literature Commission Act is even more objectionable than the act of the Rhode Island Legislature, especially in that the Oklahoma act authorizes the Commission to enter an order banning the sale of literature it finds to be objectionable and further permits the prosecution of one who violates the *administrative* ban all of which may occur *before* there is any *judicial* determination of obscenity. The defendants herein urge that the Administrative Procedures Act,

75 O.S. §301-325 affords a judicial review of any order made by the Oklahoma Literature Commission. With this we can agree, but we cannot concede that same will suffice to cure the constitutional infirmities in the Oklahoma Literature Commission Act for at least three reasons. First, there is no provision for judicial superintendence before orders are made and no requirement that the Commission seek a judicial review of its determinations of obscenity as required by "Bantam Books", "Freedman", and *Kingsley Books v. Brown,* 354 U.S. 436. Secondly, we hold that the Administrative Procedures Act is inadequate to obviate the constitutional defects in the Literature Commission Act because same provides no limitation on the time within which a decision must be made by the reviewing judge on matters submitted to him as is required by *Marcus* v. *Search Warrant, supra,* and *Kingsley Books, supra.* Thirdly, there would be no jury trial on the issue of obscenity in cases prosecuted under § 1040.6 as is required by the Oklahoma Constitution. We wholeheartedly agree with the defendants herein that the Oklahoma Literature Commission Act was passed for salutary purposes. However, we cannot under established law permit Sections 1040.1(b), 1040.6 and the last sentence in Section 1040.3 to stand. And in leaving in force those portions of the Oklahoma Literature Commission Act which are not herein declared unconstitutional, we must issue a word of warning. "Bantam Books" clearly condemns notices or orders issued to claimed offenders by a state agency such as the Oklahoma Literature Commission, and also condemns censorship effectuated by extra legal sanctions. The Commission is free to investigate and recommend prosecution to the appropriate law enforcement agency, but it may not in its activities indulge in threats of prosecution against claimed offenders or employ other means

of coercion, persuasion and intimidation. Their activities cannot, in effect, be a substitution for the State's criminal regulation of obscenity. This is the office and responsibility of the prosecutors.

Plaintiff complains of the vague and indefinite definition of "obscene literature" contained in Section 1040.1(b) of the Act. We agree that same is unconstitutional for lack of preciseness. (See *Butler* v. *Michigan,* 352 U.S. 380). However, we further hold that the definition in Section 1040.9, under which the fourteen cases were filed, substantially conforms with the standard of constitutionally unprotected material as set forth in *Roth* v. *U.S.,* 354 U.S. 476, *Ginsberg* v. *U.S.,* 383 U.S. 463, and *Fanny Hill* v. *Attorney General,* 383 U.S. 413.

Defendants have urged us to abstain from determination of constitutional questions herein. This matter was disposed of in our written order of June 9th overruling motions to dismiss. We neither add to nor subtract from that ruling here.

Counsel for the plaintiff will prepare a Judgment in conformity with the foregoing. Rule 58 F.R.C.P.

Dated this 26th day of September, 1966.

/s/ *John C. Pickett*
United States Senior Circuit Judge
/s/ *Fred Daugherty*
United States District Judge
/s/ *Luther B. Eubanks*
United States District Judge

APPENDIX 2

Judgment entered by the United States District Court for the Western District of Oklahoma on November 4, 1966.

The above captioned comes on for determination before a three-judge court pursuant to Sections 2281 and 2284 of Title 28, U.S.C. The Court, after considering the briefs filed herein and hearing argument of counsel, finds, in accordance with its written Memorandum Opinion herein, that:

I

The fourteen pending criminal cases wherein plaintiff here is the defendant, shall not be enjoined or interfered with by this Court.

II

The defendants and those acting on their behalf shall be restrained and enjoined from making any order prohibiting the sale or distribution of any literature and from instituting any criminal proceedings under Section 1040.6, Title 21, Oklahoma Statutes, for violation of any Commission orders.

III

Sections 1040.1 to 1040.10 of Title 21 of the Oklahoma Statutes are constitutional except as to those portions hereinafter specifically held to be unconstitutional.

IV

21 Oklahoma Statutes 1040.1(b) is unconstitutional and is therefore null and void.

V

21 Oklahoma Statutes 1040.6 is unconstitutional and therefore null and void.

VI

The last sentence of 21 Oklahoma Statutes 1040.3 is unconstitutional and therefore null and void.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

I

The fourteen pending criminal cases wherein plaintiff here is the defendant shall not be enjoined nor interfered with by this Court.

II

The defendants shall be restrained and enjoined from making any order prohibiting the sale or distribution of any literature and from instituting any criminal proceedings under Section 1040.6 for violation of any Commission order.

III

21 Oklahoma Statutes 1040.1 to 1040.10 are constitutional except as to those portions hereinafter specifically held to be unconstitutional.

IV

21 Oklahoma Statutes 1040.1(b) is unconstitutional and therefore held to be null and void and without force and effect.

V

21 Oklahoma Statutes 1040.6 is unconstitutional and is therefore null and void and without force and effect.

VI

The last sentence of 21 Oklahoma Statutes 1040.3 is unconstitutional and therefore null and void and without force and effect.

/s/ *John C. Pickett*
United States Senior Circuit Judge

/s/ *Fred Daugherty*
United States District Judge

/s/ *Luther B. Eubanks*
United States District Judge

APPENDIX 3

Rules and Regulations of the Oklahoma Literature Commission (Defendants' Exhibit 4).

I. DESCRIPTION OF ORGANIZATION

The Oklahoma Literature Commission shall consist of the Commissioner of Charities and Corrections, who shall serve as Secretary and keep all the records and files of the Commission; the Attorney General or a member of his staff designated by the Attorney General; the State Superintendent of Public Instruction or a member of the State Department of Education designated by such State Superintendent. The Attorney General or the designated member of his staff shall be the Chairman of said Commission. The Commission shall meet whenever necessary at the call of the Chairman in the office of the State Commissioner of Charities and Corrections or such other place as may be designated by the Chairman. The Commission shall undertake such investigations into the sales of literature which said Commission or a majority thereof has reason to believe is detrimental to the morals of the citizens of this State. The Commission will receive complaints filed with the Secretary in writing together with any available evidence furnished to it by any citizen of this State.

II. HEARINGS BY THE COMMISSION

The Commission shall hold hearings and make findings on literature it suspects to be obscene through the investigation of the Commission or upon evidence furnished to it by any citizen of the State. All such hearings shall be conducted in accordance with the rules for conducting an "individual proceeding" under the Administrative Pro-

cedures Act (75 O.S. Supp. 1965, § 309). No formal hearing shall be held except upon 15 days notice to the offending party or parties accused of providing the citizens of this State with the alleged obscene literature. Any person, partnership, company, corporation or other agency accused of selling, distributing, or otherwise providing the citizens of this State with the alleged obscene literature, or any other interested person, may appear at such hearing and give evidence upon the matters under consideration. The evidence received by the Commission shall be governed by the provisions of 75 O.S. Supp. 1965, § 310 and the attendance of witnesses, production of records, subpoenas, etc., shall be in accordance with 75 O.S. Supp. 1965, § 312.

III. ORDERS—NOTIFICATION

The Commission shall make its order at the conclusion of all formal hearings. The orders of the Commission shall be either a recommendation for prosecution under the criminal laws of the State or prohibition against the sale or distribution of any literature it finds to be obscene, or both.

Should the Commission, after notice and hearing, find any literature obscene and that the sale or distribution thereof should be prohibited or that the Commission should recommend prosecution against any person, partnership, company, corporation, or other agency for selling, distributing or otherwise providing such literature to citizens of this State, the Commission shall notify the offending party or parties of its intended action, by certified mail at least ten (10) days before entering any formal order in said cause. If the offending party or parties shall cease the sale and distribution of such obscene literature and notify the Commission, then, the Commission shall make

a minute of such fact and take no further action. If, however, the offending party or parties do not cease the sale and distribution of such obscene literature, after notice, the Commission shall either prohibit, by written order, the further sale or distribution of such obscene literature or shall by written order, recommend the prosecution of such party or parties to the County Attorney of the County where such distribution is taking place, and the Commission shall furnish the County Attorney any evidence it might have obtained during its hearings and proceedings in relation thereto.

All final orders made by the Commission shall be in accordance with the provisions of 75 O.S. Supp. 1965, § 312.

IV. PROCEDURES FOR REHEARING, REVIEW AND APPEAL.

All proceedings for rehearing, reopening, or reconsideration of any decision of the Commission; judicial review; staying enforcement of any decision of the Commission pending review; transmission of record on appeal; action of the reviewing court without a jury; and appeal to the Supreme Court shall be had in accordance with the provisions of 75 O.S. Supp. 1965, §§ 317 to 323. A qualified reporter shall be provided by the Commission at any formal hearing. After service of a petition for review by any aggrieved party the Commission shall cause the reporter to transcribe the entire record of the proceedings and furnish the same to the reviewing court at the cost of the appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

HOLDING *v.* BLANKENSHIP ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 1088. Decided May 15, 1967.

PER CURIAM.

Probable jurisdiction noted as to Question 1. The judgment of the District Court for the Western District of Oklahoma entered November 4, 1966, is reversed insofar as it adjudged provisions of §§ 1040.1 to 1040.10 of Title 21 of the Oklahoma Statutes to be constitutional. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58. Treating the nonappealable issue presented by Question 2 as if contained in a petition for a writ of certiorari, the petition is denied. See *Mishkin* v. *New York*, 383 U. S. 502, 512.

MR. JUSTICE HARLAN concurs in the denial of certiorari as to Question 2, but would affirm the judgment of the District Court as to Question 1.

MR. JUSTICE WHITE would note probable jurisdiction and set the case for oral argument.